No. 96-542

In The

Supreme Court of the United States

October Term, 1996

WALTER McMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit's determination that, under Alabama law, local sheriffs are not policymakers for the county government is a proper application of this Court's guidance in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989)?

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Respondent Monroe County, Alabama respectfully requests that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only federal constitutional provision Respondent contends to be directly at issue in the question raised by the Petition for a Writ of Certiorari is the Eleventh Amendment. Resp. App. 1a. The only federal statutory provision involved is 42 U.S.C. § 1983. Pet. App. 81a.

State constitutional provisions which are involved in the issue before the Court include: Ala. Const. of 1901 art. V, § 112, art. V, § 121, art. V, § 138, art. VII, § 174 and Amend. No. 35. State statutory provisions involved include: Ala. Code §§ 36-21-10, 36-21-16, 36-21-46 and 36-22-3 (1975). The texts of these statutory provisions are reproduced in Respondent's Appendix.

STATEMENT OF THE CASE

Upon review of the petitioner's "Statement of the Case", Respondent Monroe County, Alabama does not perceive any misstatements of the facts which would have a bearing on the "question of what issues would

properly be before the Court if certiorari were granted" except the following:

In petitioner's "Statement of the Case," McMillian asserts that "any judgment against Sheriff Tate is likely not to be paid from the state treasury, but by Monroe County through its insurance policy with the Association of County Commissions of Alabama." Pet. 3 (citing Pet. App. 77a). The record does not support petitioner's broad conclusion here. The order referred to by petitioner merely grants permissive and very limited intervention to a self-insurance fund "which *may* cover the defendant Monroe County and Tom Tate, the Sheriff of Monroe County or individually, as to some, but not all of the claims made against them in this suit." *Id.* (emphasis added). Even if the County's self-insurance policy had explicitly covered Sheriff Tate for all claims against him, there would be no waiver of sovereign immunity under Alabama law. *See Alabama State Docks v. Saxon*, 631 So. 2d 943, 946-48 (Ala. 1994).

REASONS NOT TO GRANT THE WRIT

I. THE ELEVENTH CIRCUIT'S DETERMINATION THAT, UNDER ALABAMA LAW, LOCAL SHERIFFS ARE NOT POLICYMAKERS FOR THE COUNTY GOVERNMENT IS A PROPER APPLICATION OF THIS COURT'S GUIDANCE IN *PEMBAUR V. CITY OF CINCINNATI*, 475 U.S. 469 (1986), *CITY OF ST. LOUIS V. PRAPROTNIK*, 485 U.S. 112 (1988), AND *JETT V. DALLAS INDEP. SCHOOL DIST.*, 491 U.S. 701 (1989).

Petitioner challenges the Eleventh Circuit's determination that Alabama sheriffs are not final *county* policymakers in the area of law enforcement primarily because the decision is, in their view, inconsistent with this Court's holding in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (plurality opinion). Indeed, *Pembaur* did accept the Sixth Circuit's conclusion that, under Ohio law, sheriffs and prosecutors are county officials authorized to establish official law enforcement policy for the county. 475 U.S. 476. However, *Pembaur* cannot fairly be characterized as establishing a universal principle, that under the laws of all states, sheriffs will be considered final policymakers for counties with respect to law enforcement activities. To the contrary, *Pembaur* and its progeny recognize that since no two states are going to define policymaking authority identically, the various circuit courts of appeal should make independent evaluations of each state's law and these evaluations are due to be afforded "great deference." *See Pembaur*, 475 U.S. 484 & n. 13; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-25 (1988) (plurality opinion); and *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737-38 (1989).

Praprotnik and *Jett* make it clear that the question presented by petitioner must be resolved on the basis of *state* law. *See Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 123 (plurality opinion). Because the Eleventh Circuit properly based its decision on an analysis of Alabama law, the holding below is consistent with the legal principles articulated in *Pembaur*.

A. *Pembaur, Praprotnik* and *Jett* Emphasize the Importance of State Law in Determining Who Is a Policymaker and for Whom He Makes Policy; They Do Not Dictate Uniformity of Results When Their Principles Are Applied to Different Local Law Contexts.

In *Pembaur*, this Court wisely refused to delve into the minutiae of Ohio state law and re-examine the Sixth Circuit's basis for holding Ohio counties liable for the misconduct of sheriffs and prosecutors. Instead, the Court merely accepted the Sixth Circuit's determination as being the "definitiv[e] constru[ction] . . . " of Ohio law and proceeded to analyze the county's liability under § 1983 taking the Sixth Circuit's determination as a given. 475 U.S. at 491 (O'Connor, J., concurring). Justice Brennan, in writing for the plurality, consistently referred to the description of Ohio sheriffs as final county policymakers as being the Sixth Circuit's conclusion, not the conclusion of this Court.

> Based upon *its* examination of Ohio law, the *Court of Appeals* found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement.

475 U.S. at 476 (citation omitted) (emphasis added); *see also* 475 U.S. at 484 ("[T]he *Court of Appeals* concluded, based upon *its* examination of Ohio law . . . ") (emphasis added). Because the Sixth Circuit's determination on the issue of final policymaking authority necessarily arises out of state law, 475 U.S. 483, this Court, as is its practice in matters involving state law, afforded the determination "great deference." 475 U.S. 484 n. 13 (*citing United States v. S.A. Empressa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 815, n. 12 (1984), *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 499-500 (1985) (citing cases), and *Bishop v. Wood*, 426 U.S. 341, 345-347 (1976)).

Since *Pembaur* was released, this Court has revisited the question of final policymaking liability in two cases, one of which is not cited in McMillian's Petition for Certiorari. Although neither of the cases involve county sheriffs, both look to state law on the issue and, just as significantly, defer to the court of appeal's construction of state law.

In *City of St. Louis v. Praprotnik, supra*, the Plaintiff, once a management-level city employee, contended that the City demoted him and later terminated his employment without due process of law and in retaliation for the exercise of protected free speech. 485 U.S. at 114-17. Instead of looking to local law to see where final policymaking authority for employment was vested, as *Pembaur* suggested, the court of appeals ignored the most relevant portions of local law and broadly defined the term "municipal policymaker." 485 U.S. at 131. This Court, in reversing the Eighth Circuit, warned that "[A] federal court would not be justified in assuming that municipal policymaking authority lies somewhere other

than where the applicable law purports to put it." 485 U.S. at 126. Furthermore, the Court recognized that since states have "wide latitude" in structuring the powers given to local governments, the question of who retains final policymaking authority will be answered in a variety of ways. 485 U.S. at 124-25.

Most recently, in *Jett v. Dallas Indep. School Dist., supra,* this Court addressed the issue of final policymaking authority in yet another context. In *Jett,* a high school football coach alleged that both the school principal and district superintendent had him demoted and transferred in retaliation for the exercise of protected free speech and because of racial animus. Jett sued the school district contending that the district had delegated to the principal and superintendent final policymaking authority in the matter of employment. From a substantial plaintiff's verdict, the school district appealed on the ground that the plaintiff had failed to prove that the individual defendants' conduct represented official school district policy. The Fifth Circuit Court of Appeals agreed with the school district and reversed on this ground. Although generally affirming the Fifth Circuit's reversal of the district court, this Court remanded the issue of final policymaking authority to the Court of Appeals with instructions for the court to examine Texas law on the issue. 491 U.S. at 737-38. Again, great deference is shown, in this case prospectively, to the court of appeals' determination as to state law. "We think the Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the defendant] possessed final policymaking authority. . . . " *Id.*

Petitioner's insistence that the Eleventh Circuit strayed from the course of this Court's guidance on the issue of final policymaking authority makes the mistake of "overlooking the forest for the trees." While carefully following the guidelines as set out by *Pembaur, Praprotnik,* and *Jett,* the Eleventh Circuit analyzed Alabama law and came to a different conclusion than did the Sixth Circuit in *Pembaur* after analyzing Ohio law. The Eleventh Circuit acknowledged that its duty under *Pembaur, Praprotnik,* and *Jett* was to examine Alabama law to determine whether the sheriff exercises final policymaking authority for the county in the area of law enforcement and then properly fulfilled that duty. *McMillian v. Monroe County, Ala.,* Pet. App. 5a-6a. Its conclusions about the way Alabama allocates its local law enforcement authority are consistent with this Court's pronouncements and are entitled to deference.

B. The Eleventh Circuit Properly Applied the Principles of *Pembaur, Praprotnik* and *Jett* In the Context of Local Law to Determine That Sheriffs in Alabama Are Not Law Enforcement Policymakers for Local Counties.

On pages 5a and 6a of its Opinion, the Eleventh Circuit Court of Appeals sets out general principles of municipal liability which can be gleaned for *Monell, Jett, Praprotnik,* and *Pembaur.* Significantly, McMillian's petition fails to point out exactly where the Eleventh Circuit departed from the principals stated in *Pembaur, Praprotnik,* and *Jett.* Instead, McMillian is content to point out the result of the Sixth Circuit's analysis in *Pembaur,* note the similarities between Ohio sheriffs and Alabama sheriffs,

ignore the stark differences, and demand the same result from the Eleventh Circuit when applying Alabama law. This approach is overly simplistic.

After analyzing this Court's most recent pronouncements on the issue of municipal policymaking liability, the Eleventh Circuit took what it called a "fresh look" at its prior holding in *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993) which had been vacated by this Court on jurisdictional grounds in *Swint v. Chambers County Comm'n*, 513 U.S. ___, 115 S. Ct. 1203 (1995). Pet. App. 6a.[1] In *Swint*, the Eleventh Circuit, facing the identical question presented by the instant case, determined that Alabama sheriffs were not final policymakers for the county with respect to law enforcement. The court's reasoning was founded upon the inescapable conclusion that Alabama counties possessed no law enforcement authority. *Id.* at 7a. In reaffirming the reasoning of *Swint*, the court pointed out how closely associated Alabama sheriffs are with state as opposed to county government. First, Alabama sheriffs are state officers and not county officials and, therefore, counties are not liable for the actions of sheriffs, according to state law, under a *respondeat superior*

[1] Petitioner presumes that because this Court granted certiorari in *Swint* that it must do so again in the instant case. Pet. 18-19. That need not be the case. The Eleventh Circuit, after acknowledging the grant of certiorari in *Swint*, Pet. App. 7a, thoroughly re-analyzed the basis for its finding that Alabama sheriffs exercise no county law enforcement power and reaffirmed its conclusion in *Swint*. The court below specifically addressed the arguments raised by petitioner before this Court. A close examination of the court of appeals' opinion reveals nothing which provides a basis for the granting of certiorari.

theory. *Id.* at 7a. In fact, the "critical question" decided in *Swint*, and re-examined in *McMillian*, was "whether an Alabama sheriff exercises *county power* with final authority when taking the challenged action." *Id.* at 7a (emphasis added). The Eleventh Circuit answered that question in the negative in both *Swint* and *McMillian* because Alabama grants law enforcement authority to sheriffs and not counties. *Id.* at 8a; *see* Ala. Code § 36-22-3(4) (1991) ("It shall be the duty of the *sheriffs* in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to gather evidence of crimes in their counties. . . . ") (emphasis added). This statutory grant of power directly to sheriffs is significant because, under Alabama's governmental structure, county governments can only exercise the authority explicitly granted them by the state legislature. Pet. App. 8a (citing *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)).

The court then explains why it is convinced that a municipality must possess power in a particular area before it can incur liability for an official's actions in that area. Pet. App. 8a. Such a conclusion is rooted in the description of a municipal policymaker as the official with final decisionmaking responsibility "in any given area of a local government's business." *Id.* at 8a (quoting *Praprotnik*, 485 U.S. at 125). Based on that language, the court properly concluded that, in a case like the instant one, the threshold question is "whether the official [was] going about the local government's business" when the alleged violation occurred? *Id.* The opinion then listed a

variety of other circuits which had asked similar questions in similar contexts. *Id.* at 8a-9a.

The court also addresses the illogic of McMillian's position that because the sheriff's law enforcement authority is unreviewable within the county and he possesses no significant law enforcement authority outside the county, the authority he holds must derive *from* the county. If, as *Praprotnik* concludes, different entities can share final policymaking authority, it naturally follows that one policymaker's actions could support municipal liability even though other policymakers possessed final policymaking authority and set different policy. *Id.* at 10a. The court analogized to a scenario where a particular city council could authorize its police department precinct commanders to set their own arrest policies without creating a patchwork quilt of precinct liability; liability would still attach only to the municipality which had delegated its final policymaking authority to each precinct commander. *Id.* at 10a.

In the next major section of the opinion, the court of appeals below addressed McMillian's contention that either this Court's or the Sixth Circuit's ruling in *Pembaur* "controls" the result in the instant case. *Id.* at 11a. The Eleventh Circuit properly observed that this Court's *Pembaur* opinion did not address the question of whether an Ohio sheriff is a county policymaker nor did the decision comment upon the state law factors underlying the Sixth Circuit's conclusion that Ohio sheriffs are county policymakers. *Id.* In *Pembaur*, the sole "question presented [was] whether and in what circumstances, a decision by municipal policymakers *on a single occasion* may satisfy" the *Monell* official-policy requirement. 475 U.S. at 471

(emphasis added).[2] Even if this Court's decision in *Pembaur* can be read to give implicit approval to the Sixth Circuit's reading of Ohio law, that decision would not dictate the same conclusion in this case. As the Eleventh Circuit observed, "Ohio law determined the Sixth Circuit's conclusion[; b]ut Alabama law compels our conclusion." Pet. App. 11a.

The Eleventh Circuit's opinion goes on to refute McMillian's claim that Alabama law and Ohio law are virtually the same in the manner that each allocates law enforcement authority. *Id.* at 12a. While similarities exist, especially in election (by county electors) and fiscal support (county pays salary and funds sheriff's department), significant differences exist. First, under an explicit provision of the Alabama Constitution of 1901, sheriffs are state officers and part of the state executive department. *See* Ala. Const. art V, § 112; *Parker v. Amerson*, 519 So. 2d 442 (Ala. 1987). As stated above, because of their unique relationship with the state, Alabama sheriffs cannot create respondeat superior liability for the counties in which they operate. *See Hereford v. Jefferson Co.*, 586 So. 2d 209, 210 (Ala. 1991); *Parker v. Amerson*, 519 So. 2d at 442. Significantly, the association of sheriffs with the state is so close in Alabama that sheriffs are protected by Alabama's grant of sovereign immunity in Article I, § 14 of Alabama's Constitution. Pet. App. 12a (citing *Hereford*,

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[2] *See also* Brief of Petitioner in No. 84-1160, *Pembaur v. City of Cincinnati* (presenting, as the sole question for review, the following: "Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy as to render a county liable under 42 U.S.C. § 1983?").

586 So. 2d at 210; *Parker v. Amerson*, 519 So. 2d at 442). Clearly, Alabama's constitutional and statutory establishment of its sheriffs as state executive officers is much more substantial than McMillian's characterization of it as an "occasional label." There is nothing comparable in Ohio law which so closely identifies sheriffs with the state. *See* Pet. App. 12a.

C. Additional aspects of Alabama law support the conclusion that sheriffs are not final policymakers for the county in the field of law enforcement.

Besides the aspects of Alabama law mentioned in its opinion, other state law considerations undergird the Eleventh Circuit's determination.

Alabama, like all other states, has both a state government and county governments. Ala. Code § 11-1-1. Unlike in many states, however, Alabama counties do not have "home rule" powers and are restricted to performing relatively narrow functions expressly delegated to them by state law. These functions primarily involve construction and maintenance of the county road system, a county courthouse, and a county jail.[3] *See id.*, §§ 11-3-10, 11-3-11, 11-14-10. There is no statute authorizing counties to engage in law enforcement.

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[3] This Court recognized just four years ago that the "principal function" of county commissions in Alabama "is to supervise and control the maintenance, repair, and construction of county roads." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 493-94 (1992) (citing Ala. Code §§ 11-3-1, 11-3-10).

The nature of functions of the office of sheriff in Alabama are also specified by state law. There is a sheriff in each county of the State, elected by the voters of that county. Ala. Const. art. V, § 138. As mentioned above, under the Alabama Constitution of 1901, sheriffs are specifically designated as *state* executive officials. *Id.* § 112 ("The executive department shall consist of a governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, *and a sheriff for each county.*") (emphasis added). As a result, they share the same sovereign immunity and Eleventh Amendment immunity accorded to other state officials. *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *Parker v. Amerson*, 519 So. 2d 442, 446 (Ala. 1987).

Sheriffs in Alabama have three basic functions: assisting the state judicial system by serving process and performing other related tasks, Ala. Code § 36-22-3(1); operating the jail, *Id.* § 14-6-1; and enforcing state law in their county, *Id.* § 36-22-3(4). With respect to judicial functions, the sheriffs take orders from, and are supervised by, state judges when they are sitting in their counties.[4] With respect to jail operations, they receive general supervision from the Alabama Department of Corrections. *See id.* §§ 14-6-84, 14-6-85, 14-6-86, 14-6-90, and

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[4] The primary trial court in the Alabama judicial system is the circuit court. There are forty judicial circuits, some of which are limited to one county while others encompass multiple counties. The presiding judge of each circuit exercises "general supervision" over the sheriff or sheriffs in the circuit. Ala. Code § 12-17-24. Other judges may also direct the activities of sheriffs with respect to particular matters. *Id.* § 36-22-2(3).

14-6-98. In the area of law enforcement, sheriffs are not supervised on a day-to-day basis, but they can be directed to perform criminal investigations and make reports about those investigations by the governor, the state attorney general or the district attorney. *Id.* § 36-22-5.[5] Moreover, the governor is authorized to require sheriffs to provide "information in writing, under oath," concerning the conduct of their duties. Ala. Const. art. V, § 121.

The 1901 Constitution also specified that sheriffs may be removed from office for misconduct only through an original impeachment action in the Alabama Supreme Court, generally initiated by the state attorney general at the request of the governor. Ala. Const. art. VII, § 174. This was a change from the former system, under which sheriffs were impeached at the local level. Ala. Const. art. VII, § 3 (1875).[6] The change was made in order to tighten central control over sheriffs, in response to the perception that "the neglect of sheriffs" had led to an "excessive number of lynching cases in Alabama." *Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987). At that time, "the failure of county courts to punish sheriffs for neglect of duty and sheriffs' acquiescence in mob violence and ruthless vigilantism . . . led [the Governor] to believe that sheriffs must be held accountable to a higher and more central

[5] District attorneys, in turn, are state employees elected to perform prosecutorial functions for a given judicial circuit. Ala. Code § 12-17-180.

[6] A very similar provision, covering removal by county courts of various specified "county officers" and city officials, but *excluding* sheriffs, was retained in the 1901 Constitution. Ala. Const. art. VII, § 175.

authority, the Supreme Court, and that this accountability would operate to guarantee the political rights of prisoners." *Id.* at 443-44; *see also id.* at 444. ("Sheriffs were made more accountable to the supreme executive power of the state, the Governor.").[7]

Alabama law gives county commissions *no* role in the development of policies governing local law enforcement or in the supervision of sheriffs in the performance of their law enforcement duties. *See Lockridge v. Etowah County Comm'n*, 460 So. 2d at 1363; *see also Terry v. Cook*, 866 F.2d 373, 379 (11th Cir. 1989) (noting that county commissions have no authority to hire or fire deputy sheriffs); *King v. Colbert County*, 620 So. 2d 623, 625 (Ala. 1993) (holding that county commissions have no control over jail operations). They do, however, have statutory obligations to provide funds and facilities to be used by sheriffs. *See* Ala. Code § 11-14-10 (duty to maintain a jail); *id.* § 36-22-16 (duty to pay a specified salary to sheriff); *id.* § 36-22-18 (duty to furnish sheriff with necessary quarters, supplies, and automobiles). If a county appropriates an unreasonably small amount of money for these purposes, a sheriff can sue the commission in state court for relief. *See Geneva County Comm'n v. Tice*, 578 So. 2d 1070 (Ala. 1991); *Etowah County Comm'n v. Hayes*, 569 So. 2d 397 (Ala. 1990).

Petitioner argues that "Alabama law and the Alabama courts frequently have expressed the common

[7] The 1901 Constitution also specified that it was an impeachable offense for a sheriff to make a false report to the Governor or to allow a prisoner in the county jail to be removed and killed or injured. Ala. Const. art. V, §§ 121, 138.

understanding of the sheriff as a county-based official setting policy for the county." While the cases cited by petitioner may describe the sheriff as being a county officer in very limited contexts, none of the cases or statutes cited describe the sheriff as acting with county power when he exercises the law enforcement function given him by the state.

II. ALTHOUGH THE LAWS OF INDIVIDUAL STATES VARY IN THE WAY LAW ENFORCEMENT AUTHORITY IS ALLOCATED BETWEEN STATE AND COUNTY GOVERNMENTS, THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PREEMINENCE OF STATE LAW IN THE DETERMINATION OF WHERE FINAL COUNTY POLICYMAKING AUTHORITY IS REPOSED.

Petitioner attempts to manufacture a conflict among the circuit courts of appeal by pointing out that some circuits have found sheriffs to be final policymakers for the county while other circuits have come to the opposite conclusion. Certainly, several circuits, after analyzing local law, have denominated sheriffs to be final policymakers for the county with respect to law enforcement. *See Pembaur v. City of Cincinnati*, 746 F.2d 337, 340-41 (6th Cir. 1984) (finding, upon detailed review of Ohio statutes, Ohio sheriffs to be county officer and final repository of county law enforcement authority); *Turner v. Upton County, Tex.*, 915 F.2d 133, 136 (5th Cir. 1990) (considering "unique structure of county government in Texas," Court finds the county liable for the sheriff's acts and acknowledges that "[it] has long been recognized that, in Texas, the county sheriff is the county's final policymaker in the

area of law enforcement. . . . "); *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991) (Applying Washington state law, court finds the sheriff to possess final authority for the training of his deputies); and *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989) (finding, based upon Arizona law, county liable for sheriff's law enforcement-related misconduct). Even the Eleventh Circuit can be added to this list since it found that, under Florida law, sheriffs are final policymakers with respect to county law enforcement. *See Lucas v. O'Loughlin*, 831 F.2d 232, 234-35 (11th Cir. 1987).

At least two other circuit courts, after analyzing the laws of a particular state within their circuit, have refused to find that sheriffs are the final policymaking authority for the county. *See Soderbeck v. Burnett County, Wis.*, 821 F.2d 446 (7th Cir. 1987) (holding county not liable for acts of sheriff because Wisconsin Supreme Court had conclusively ruled that Wisconsin sheriffs are state officers accountable only to the state); *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988) (holding that Oklahoma counties were not liable for the acts of sheriff deputies because the counties "have no statutory duty to hire, train, supervise or discipline the county sheriffs or their deputies"); *see also Thompson v. Duke*, 882 F.2d 1180 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990) (holding that Cook County Illinois is not responsible for jail personnel policies because the sheriff is the sole authority with respect to jail employees, and the sheriff is "an independently-elected constitutional officer who answers only to the electorate, not to the Cook County Board of Commissioners); *Baez v. Hennessy*, 853 F.2d 73 (2nd Cir. 1988) (holding that New York counties were not liable for county district

attorneys prosecuting criminal matters because the district attorneys, when pursuing prosecutions, represented the state and not the county); *Wing v. Britton*, 748 F.2d 494 (8th Cir. 1984) (finding that Arkansas cities could not be liable for the acts of deputies because under Arkansas law, sheriffs were exclusively responsible for deputies and not cities); *Owens v. Fulton County*, 877 F.2d 947, 950-51 (11th Cir. 1989) (holding that, under Georgia law, district attorneys, when prosecuting state laws, are not final policymakers for the county despite the fact that they are elected solely by county voters).

There is no conflict among the circuits over the preeminence of state law in the determination of whether an official is to be considered a final policymaker for a particular governmental entity. Because the different circuit courts of appeal were merely construing the laws of different states, a variance of results should be expected. *See Praprotnik*, 485 U.S. at 124-25. Apparently, the petitioner would have the circuit courts of appeal abide by a "one size fits all" jurisprudence of final policymaking authority. Not only is such a request illogical, it is directly contrary to the dictates of *Pembaur*, *Praprotnik*, and *Jett*. Regardless of how Ohio, Texas, Florida, or any other state allocates law enforcement authority between state and local government officials, Alabama law, as discussed above, makes it clear that the sheriff, when enforcing the state's criminal code, is a repository of *state* law enforcement authority, not county. Under Alabama law, there is no such thing as county law enforcement authority. The Petition for a Writ of Certiorari should be denied because there is no conflict among the circuits.

III. IMPOSING LIABILITY UPON MONROE COUNTY, GIVEN THE COUNTIES' LACK OF LAW ENFORCEMENT AUTHORITY UNDER ALABAMA LAW, WOULD UNDERCUT THE BASIC FOUNDATIONS OF MUNICIPAL LIABILITY AS ARTICULATED IN *MONELL*.

Although the Eleventh Circuit noted Monroe County's arguments based on *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), Pet. App. 4a, nothing in the opinion indicates it based its holding on these arguments. Nonetheless, the Court should deny certiorari on the alternative basis that a holding in favor of Monroe County is compelled by the reasoning of *Monell*. *Compare Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (affirming the circuit court of appeals on a ground not relied upon by the circuit court). For the reasons stated below, the holding of this Court in *Monell* is extremely important to the question presented to the Court.

A. Petitioner's Argument Cannot Be Squared With the Primary Factor That Led This Court to Recognize Municipal Liability in *Monell* – the Status of Municipalities as Separate "Corporations" Under State Law.

In *Monell*, this Court held that municipalities were "persons" within the meaning of § 1983. The Court based its conclusion on the fact that municipalities are organized as "corporations" under state law and because the Dictionary Act and various Court decisions had determined that by 1871 corporations (including "municipal corporations") were generally treated as "persons" for purposes of statutory analysis. 436 U.S. at 687-89. This

view of municipalities as separate public corporations is a consistent theme throughout the *Monell* opinion and throughout the legislative record analyzed in that opinion. *See, e.g.*, 436 U.S. at 668; *id.* at 669. It was what led the Court to equate municipalities with the other "persons" who could be sued under § 1983 – i.e., individual public officials in their individual capacities. *See, e.g.*, 436 U.S. at 685-86; *see also*, 436 U.S. at 682; *id.* at 707-08 (Powell, J., concurring).

However, accepting the petitioner's position – that Monroe County is liable for policies created by the incumbent in an office that it did not create and cannot control – would require the Court to abandon this concept of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is difficult to imagine how a single corporation could include both a governing board and a separate official vested with unchecked authority to set corporate policy. That reality is reflected in the suits against "municipalities," 436 U.S. at 690, suits against "[l]ocal governing bodies," *id.*, and suits against a local "government as an entity." *id.* at 694. Certainly, the Sheriff of Monroe County is not a municipality, a local governing body or a local government, nor is he an agent thereof.

In essence, petitioner seeks to have the Court adopt a radically different conception of "Monroe County" as a unit of *geography*, which can have "policies" that are set both by the County Commission (including those officials to whom the commission delegates authority) *and* by any other officials authorized by state law to operate in that

geographic area. But it was not suits against units of geography but suits against "municipalities," defined as units of *government*, that the Supreme Court had in mind in *Monell*. *See* 436 U.S. at 694 ("[I]t is when the execution of a government's policy or custom . . . inflicts the injury that the *government* as an entity is responsible under § 1983.") (emphasis added). The only basis for treating municipalities as "persons" under § 1983 was the Supreme Court's understanding in *Monell* of cities and counties as corporate entities with a separate, coherent and cohesive structure and a single governing body. It would make no sense to abandon that understanding and thereby expand municipal liability beyond anything that Congress could have had in mind.

B. McMillian's Argument is Also Inconsistent With the Causation Requirement Recognized in *Monell*.

The tension between petitioner's position and *Monell* is even clearer in light of the Supreme Court's second holding – that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal *policy* of some nature *caused* a constitutional tort." 436 U.S. at 691 (emphasis added); *see also id.* at 694 (allowing municipal liability since the case "unquestionably involve[d] official policy as the *moving* force of the constitutional violation") (emphasis added). In every legal and practical sense, it is absurd to suggest that Monroe County as a municipal corporation (or the Monroe County Commission as its governing body) adopted or ratified a law enforcement policy that caused the alleged violations of petitioner's constitutional rights.

1. *Origins of the Causation Requirement.*

The causation requirement in *Monell* was derived, in part, from the language of § 1983, which creates a right of action against "any person who . . . shall subject or cause to be subjected" any other person to a deprivation of federal rights. As the Supreme Court recognized, this "language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights," but it also "suggests that Congress did not intend § 1983 liability to attach where such causation was absent." 436 U.S. at 692; *see also Pembaur,* 475 U.S. at 478 (stating that "*Monell* is a case about responsibility.").

Even more important to the Court's conclusion was "the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." *Pembaur,* 475 U.S. at 479 (emphasis in original). This insight was derived from rejection in the House of Representatives of the "Sherman amendment," a proposed addition to the same act that contained § 1983, which, as noted above, would have imposed liability on municipalities whenever private citizens within their borders " 'riotously and tumultuously assembled . . . with intent to deprive' " another person of a federal right. *See Monell,* 436 U.S. at 666 (quoting the first conference version of the amendment); *see also Jett,* 491 U.S. at 726-27.

As the *Monell* Court exhaustively demonstrated, this proposal was defeated on the ground that many of "the

local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local government to create police forces," either directly or through imposition of liability for damages. 436 U.S. at 673; *see also id.* at 680 (quoting Rep. Burchard); Cong. Globe 794 (April 19, 1871) (Rep. Poland); *id.* at 791 (Rep. Willard); *id.* at 795 (Rep. Blair). The *Monell* Court noted that the legislative history reveals "ample support for [Representative] Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly." 436 U.S. at 679. But, having reviewed this history, the Supreme Court in *Monell* concluded that Congress in 1871 did not create the same "Hobson's choice," because, instead of "imposing an obligation to keep the peace" that did not exist in state law, § 1983 applied only where "a municipality . . . was obligated by state law to keep the peace, but . . . had not in violation of the Fourteenth Amendment." *Id.*

2. *Application of the Requirement to This Case.*

The *Monell* causation requirement is implicated here in two ways. First, of course, there is a conflict between petitioner's position and the *Monell* Court's specific holding that § 1983 cannot be read to impose liability on municipalities for failure to enforce the law if state law does not grant them law enforcement powers. As the Eleventh Circuit in *McMillian* held, "Alabama law assigns

law enforcement authority to sheriffs but not to counties." *McMillian v. Johnson*, Pet. App. at 8a (citing with approval *Swint v. City of Wadley, Ala.*, 5 F.3d 1436, 1450 (11th Cir. 1993)). The Monroe County Commission has no power to enact policies affecting law enforcement or to review those adopted by the sheriff. Yet petitioner contends that the County should face potential liability under § 1983 based entirely on the law enforcement actions of Sheriff Tate.

Indeed, under petitioner's theory, the County's only means of avoiding potential liability would be to violate state law and exceed its assigned authority by attempting to control the sheriff. This is precisely the outcome that Congress sought to avoid when it rejected the Sherman amendment on the ground that it would force municipalities to perform law enforcement functions not delegated to them by state law. Thus, here again, petitioner asks the Court to adopt a statutory interpretation that would undercut one of the central understandings expressed in *Monell* itself.

At a more general level, the Court held in *Monell* that a municipality may not be held liable "*solely* because it employs a tortfeasor – or, in other words, . . . on a *respondeat superior* theory." *Monell*, 436 U.S. at 691 (emphasis in original). It concluded that Congress, having rejected one limited form of vicarious liability based on constitutional concerns in the Sherman amendment, could hardly have intended to authorize a broader form that "would have raised all the constitutional problems associated with the obligation to keep the peace." *Id.* at 693; *see also Jett*, 491 U.S. at 728-29. Petitioner's theory, however, would have the perverse effect of allowing a

form of vicarious liability under § 1983 that is even more extreme than the *respondeat superior* theory rejected in *Monell*.

IV. LOGICALLY, IF A SHERIFF IS A *STATE* OFFICER FOR PURPOSES OF ELEVENTH AMENDMENT IMMUNITY, HE SHOULD NOT BE DEEMED A *COUNTY* POLICYMAKER.

Another alternative ground for denying the Petition is on the basis of the Eleventh Amendment. Before a governmental body can be held liable for the actions of a particular individual policymaker, obviously, the policymaker must be vested by virtue of his office, with the authority to make policy. A policymaker, when setting policy for a governmental entity, necessarily acts in his "official capacity."

The Eleventh Circuit, in interpreting the Eleventh Amendment, has consistently found Alabama sheriffs (executive officers of the state) and their deputies, in their official capacities, to be representatives of the state and not the county. Consequently, suits against them in their official capacity are routinely dismissed based upon lack of jurisdiction. *See Dean v. Barber*, 951 F.2d 1210, 1215 n. 5 (11th Cir. 1992); *Free v. Granger*, 887 F.2d 1552, 1557 (11th Cir. 1989); *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *see also Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1527 (11th Cir. 1990) (holding that Eleventh Amendment immunity also extends to deputy sheriffs in Alabama). In the instant case, the district judge dismissed Sheriff Tate in his official capacity based on his entitlement to Eleventh Amendment Immunity as an officer of the state of Alabama.

McMillian does not challenge the ruling that Alabama sheriffs are state officers for the purpose of the Eleventh Amendment but contends that sheriffs are policymakers for the county nonetheless. These theories are mutually exclusive. A single official cannot simultaneously be both a county policymaker and the equivalent of the state when sued in his official capacity. A sheriff in Alabama, therefore, is necessarily a policymaker for the state and not the county.

CONCLUSION

Based upon the foregoing, Respondent Monroe County, Alabama respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

U.S. Const. amend. XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Ala. Const. of 1901, art. V, § 112.

The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.

Ala. Const. of 1901, art V, § 121.

The governor may require information in writing, under oath, from the officers of the executive department, named in this article, or created by statute, on any subject, relating to the duties of their respective offices, and he may at any time require information in writing, under oath, from all officers and managers of state institutions, upon any subject relating to the condition, management and expenses of their respective offices and institutions. Any such officer or manager who makes a willfully false report or fails without sufficient excuse to make the

required report on demand, is guilty of an impeachable offense.

Ala. Const. of 1901, art. V, § 138.

A sheriff shall be elected in each county by the qualified electors thereof, who shall hold office for a term of four years, unless sooner removed, and he shall be ineligible to such office as his own successor; provided, that the terms of all sheriffs expiring in the year nineteen hundred and four are hereby extended until the time of the expiration of the terms of the other executive officers of this state in the year nineteen hundred and seven, unless sooner removed. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

Ala. Const. of 1901, art. VII, § 174.

The chancellors, judges of the circuit courts, judges of the probate courts, and judges of other courts from which an appeal may be taken directly to the supreme court, and solicitors and sheriffs, may be removed from office

for any of the causes specified in the preceding section or elsewhere in this Constitution, by the supreme court, under such regulations as may be prescribed by law. The legislature may provide for the impeachment or removal of other officers than those named in this article.

Ala. Const. of 1901, amend. No. 35 (amending art. V, § 138).

A sheriff shall be elected in each county by the qualified electors thereof who shall hold office for a term of four years unless sooner removed, and he shall be eligible to such office as his own successor. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grevious [grievous] bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached, under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

Ala. Code § 36-21-10 (1975).

(a) All law enforcement officers employed by any county of this state who is employed as a full-time law enforcement officer shall make at least $1,300.00 per month starting salary.

(b) The provisions of this section may be enforced in any court of competent jurisdiction in this state by an action brought by any citizen seeking a writ of mandamus, mandatory injunction or other proper remedy, and the court trying the cause may order the suspension or forfeiture of the salary, expenses or other compensation of the members of the governing body failing or refusing to comply with the provisions of this section.

(c) Members of the governing body or sheriff of any county are hereby expressly prohibited from requiring law enforcement officers affected by this section to work any more hours than they were normally working in order to circumvent the provisions of this section.

(d) If for any reason any part of this section or its application to any person, body, or situation is held invalid, the remainder of this section and its application to any other person, body, or situation shall not be affected.

(e) The term "law enforcement officer" means any person whose duties involve police work and who are designated law enforcement officers by the Alabama Peace Officers Minimum Standards Act. (Acts 1984, No. 84-409, p. 958.)

Ala. Code § 36-21-46 (1975).

(a) The minimum standards provided in this subsection shall apply to applicants and appointees as law

enforcement officers who are not law enforcement officers in the state on September 30, 1971, and to applicants and appointees who, though law enforcement officers on September 30, 1971, cease to be law enforcement officers before making application for employment as a law enforcement officer or being employed as a law enforcement officer. No city, town, county, sheriff, constable or other employer shall employ any such applicant who is not on September 30, 1971, a law enforcement officer and who continues until the date of his application as a law enforcement officer unless such person shall have first submitted to the appointing authority an application for such employment verified by affidavit of the applicant and showing compliance with the following qualifications:

(1) AGE. – The applicant shall be not less than 19 nor more than 45 years of age at the time of appointment; provided, that for the purpose of calculating his age under this article, the time spent by any applicant on active duty in the armed forces of the United States of America, not exceeding four years, shall be subtracted from the actual age of such applicant who has attained the age of 40 years.

(2) EDUCATION. – The applicant shall be a graduate of a high school accredited with or approved by the state department of education or shall be the holder of a certificate of high school equivalency issued by general educational development.

(3) POLICE TRAINING. – Prior to appointment, the applicant shall have completed at least 240 hours of formal police training in a recognized police training school, which shall

include the Federal Bureau of Investigation Police Training Academy or another training school approved by the commission; provided, that an applicant may be provisionally appointed without having completed the police training prescribed in this subdivision, subject to the condition that he shall complete such training within nine months after provisional appointment; and, should he fail to complete such training, his appointment shall be null and void.

(4) PHYSICAL QUALIFICATIONS. – The applicant shall be not less than five feet two inches nor more than six feet 10 inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law enforcement officer. The commission may for good cause shown permit variances from the physical qualifications prescribed in this subdivision.

(5) CHARACTER. – The applicant shall be a person of good moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude and shall be accompanied by letters from three qualified voters of the area in which the applicant proposes to serve as a law enforcement officer attesting his good reputation.

(b) The foregoing requirements shall not apply to any person who is presently employed as a law enforcement officer in the state and who continues to be so employed when he makes application for or is employed

as a law enforcement officer in a different capacity or for a different employer. (Acts 1971, No. 1981, p. 3224, § 7; Acts 1971, 3rd Ex. Sess., No. 156, p. 4399, § 1.)

Ala. Code § 36-22-3 (1975).

It shall be the duty of the sheriff:

(1) To execute and return the process and orders of the courts of record of this state and of officers of competent authority with due diligence when delivered to him for that purpose, according to law.

(2) To attend upon the circuit courts and district courts held in his county when in session and the courts of probate, when required by the judge of probate, and to obey the lawful orders and directions of such courts.

(3) The sheriff of each county must, three days before each session of the circuit court in his county, render to the county treasury or custodian of county funds a statement in writing and on oath of the moneys received by him for the county, specifying the amount received in each case, from whom and pay the amount to the county treasurer or custodian of county funds.

(4) It shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county.

(5) To perform such other duties as are or may be imposed by law.

Ala. Code § 36-22-16 (1975).

(a) Sheriffs of the several counties in this state shall be compensated for their services by an annual salary payable in equal installments out of the county treasury as the salaries of other county employees are paid. The annual salary of the sheriff shall be $35,000.00, commencing with the next term of office, unless a higher salary is specifically provided for by law by general or local act hereafter enacted.

(b) Such salary shall be in lieu of all fees, compensation, allowance, percentages, charges and costs, except as otherwise provided by law. The sheriff and his deputies shall, however, be entitled to collect and retain such mileage and expense allowance as may be payable according to law for returning or transferring prisoners and insane persons to or from points outside the county. (Acts 1969, No. 1170, p. 2179 § 1; Acts 1971, No. 77, p. 339; Acts 1973, No. 193, p. 229; Acts 1978, No. 538, p. 596; Acts 1981, No. 81-667, p. 1091; Acts 1985, No. 85-518, p. 612.)
